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Before the
FEDERAL COMMUNICATIONS COMMISSION

MAY 21 1993

National Cable Television Association (NCTA).² Petitioners are requesting that the Commission institute a rulemaking proceeding to establish cost allocation rules for video dialtone service and to establish a Federal-State Joint Board to recommend procedures for separating the cost of local telephone company plant that is used jointly to provide telephone service and video dialtone service. The Petition also requests that the Commission hold the pending video dialtone applications in abeyance and refuse to accept any additional applications. For the reasons stated herein, the Petition must be denied.

The Petition merely restates arguments made by Petitioners in their previous comments filed in CC Docket No. 87-266 as well as in their pending Petitions for Reconsideration. It provides no new evidence and only repeats unsubstantiated allegation and supposition. As such, the Petition must be considered a late-filed reply and should be dismissed.

The only real outcome which could be achieved by granting

the ability for customers to receive programming from multiple providers and to obtain new services, and the development of an advanced telecommunications infrastructure. Such a result would not be in the public interest.

Certainly it is clear that the Commission has already dealt with the issues raised in the Petition. As shown below, the requirements specified in the Second Report and Order regarding telephone company provision of video dialtone already go far beyond the statutory requirements of the Communications Act and are more than sufficient to ensure that the allegations contained in the Petition are assuaged.

First, the Commission is requiring that, as a prerequisite to telephone company participation in the video market, telephone companies must implement a common carrier platform containing sufficient capacity to serve multiple video programmers.³ According to the Commission, this is necessary to provide multiple video programmers nondiscriminatory access to a common carrier transmission service that will enable them to deliver, and consumers to receive, video programming and video programming services. Within their Section 214 applications, telephone companies must describe how their proposed construction and operation of this new basic platform will offer sufficient capacity to serve multiple video programmers and will expand as

³Second Report and Order at p. 5797.

demand increases.⁴ Telephone companies offering the video platform must furnish capacity to any interested video programmers upon reasonable request and without unreasonable discrimination.⁵ The Commission finds that these requirements "will foster maximum competition among service providers and further our infrastructure incentives goal."⁶

Second, the Commission will permit telephone companies to exceed the carrier-user relationship only with video programmers that are customers of, interconnect with, or share the construction and/or operation of the basic platform. "Although this requirement is more restrictive than the Cable Act, it is necessary to assure that, in exceeding the current carrier-user relationship, telephone companies will both provide the basic platform to video programmers and use it as the basis for their own participation in the video marketplace."⁷

Third, the Commission adopted a two-level regulatory framework.⁸ On the first level, basic platform offerings will be classified as basic regulated services provided under tariff

⁴Id.

⁵47 U.S.C. §§ 201(a) and 202(a).

⁶Second Report and Order at p. 5798.

⁷Id.

⁸Id. at p. 5810.

and subject to nondiscrimination requirements.⁹ On the second level, telephone companies would be permitted to continue to offer today's enrichments to the basic service, including enhanced and other non-common carrier services, subject to the full panoply of existing regulations.¹⁰ "The public interest is significantly served by integrating video dialtone into this existing framework rather than by the adoption of a wholly new regulatory scheme."¹¹

In addition, the Commission agreed with NCTA that the regulatory status of particular non-carrier services is best determined in the context of a specific video dialtone proposal.¹² Because of the evolutionary nature of video dialtone, the Commission sought to avoid mandating premature or speculative service descriptions and regulatory classifications. Grant of the Petition would necessitate the development of rigid regulatory classifications, contrary to the intent of the Commission and the comments of one of the Petitioners.

Further, the Commission found that the record does not support changing its existing regulatory structure for video dialtone. "While it is true that this regulatory scheme was not

⁹Id. at p. 5827.

¹⁰Id. at p. 5811.

¹¹Id.

¹²Id. at p. 5812 and NCTA comments at p. 3.

developed with video distribution in mind, no party has demonstrated that it should be changed at this time for video dialtone. We find that the concerns of potential discriminatory conduct and improper cross-subsidization are similar for common carrier services, whether voice, data, or video."¹³ Certainly the unfounded allegations contained in the Petition do not add anything to the record to justify initiating another rulemaking proceeding designed to further restrict telephone company provision of video dialtone service and requiring the establishment of a joint board which would further delay new telephone company video dialtone service offerings.

As the Commission explains, a comprehensive regulatory scheme and cost accounting safeguards, including rules governing cost allocation and affiliate transactions, the filing and approval of cost allocation manuals, annual cost allocation audits of large telephone companies by independent auditors and Commission review of those audits, reporting of detailed cost data in the Automated Reporting and Management Information System (ARMIS) and Commission audits of carriers, are in place and are sufficient to protect against cross-subsidization concerns identified in the record and in the Petition.¹⁴ Further, the Bell Operating Companies are subject to additional safeguards, such as Open Network Architecture (ONA) requirements. Cable

¹³Id. at p. 5828.

¹⁴Id. at pp. 5828-5829.

operators' pole attachment prices are guaranteed to be reasonable by the Pole Attachment Act¹⁵ and independent access to the home is guaranteed by the Cable Communications Policy Act of 1984¹⁶.

All of these safeguards have been found to effectively protect local telephone company customers and ratepayers from prejudicial conduct in the regulated operations of telephone companies. As the National Telecommunications and Information Administration (NTIA) has explained, "the potential costs of LEC provision of video programming...either are overstated or can be effectively ameliorated by adapting existing regulatory safeguards to suit the video programming marketplace."¹⁷ The Commission has found that its discrimination safeguards are an effective alternative to guard against anticompetitive conduct and has recognized that the requirements in its cost accounting rules, the experience it has gained in practice, and its network disclosure, reporting and CPNI rules, taken together with ONA and related requirements, protect against anticompetitive conduct.¹⁸

¹⁵47 U.S.C. § 224.

¹⁶47 U.S.C. § 541(a)(2).

¹⁷NTIA, The NTIA Infrastructure Report: Telecommunications in the Age of Information (Oct. 1991) at 235. See, National Rural Telecom Association v. FCC, 91-1300 (D.C. Cir. 1993) and Southwestern Bell Corp. v. FCC, 896 F. 2d 1378 (D.C. Cir. 1990).

¹⁸Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd 7571 (1991). The safeguards specifically identified by the Commission in this Report and Order as well as in the Second Report and Order are not all that exist to protect against the alleged improper cross subsidy which is the subject

Finally, the Commission states specifically that it will be vigilant in its efforts to identify anticompetitive conduct in connection with video dialtone offerings. It further notes that it is prepared to impose additional safeguards tailored to specific video dialtone proposals in connection with the Section 214 certification process if necessary.¹⁹ The Commission states that it will undertake a review of its rules and regulatory framework to "reassess their continuing effectiveness in light of the actual development of video dialtone."²⁰ It would be frivolous to undertake an assessment so far in advance of real

of the Petition. A summary list of safeguards would include the following: cost accounting rules and allocation standards relying on generally accepted accounting principles; cost allocation manuals emphasizing greater uniformity, requirements to quantify changes and a low materiality threshold; independent audit requirements; detailed Form M, financial and other reporting; ARMIS; Commission audits; standards for jurisdictional and regulated allocation of costs; standards for transactions with affiliates; carrier audit and cost tracking systems; state commission audit and review authority; inherent demands that would require significant numbers of individuals to conceal any intentional act of cross subsidy, an impossible task; competitor access to regulated activity data and accounts; customer access to regulated activity data and accounts; competitor and customer involvement in regulatory processes, including development of standards, tariffing, complaint mechanisms and enforcement; coordination between Federal and state agencies; continuing interest and involvement of other agencies such as the Federal Trade Commission, Securities and Exchange Commission, Department of Justice, state attorneys general and the Federal Accounting Standards Board; competition; opportunities for resale; Commission experience with cross subsidy safeguards; increased enforcement authority and high forfeiture amounts; price cap regulation; marketplace influence of large customers and other carriers; effective market pressure of other exchange carriers; and Federal and state statutes, including antitrust statutes.

¹⁹Second Report and Order at p. 5832.

²⁰Id.

video dialtone implementation. Video dialtone service offerings are still evolving. The rules suggested by the Petition are premature at best.

The Commission's approach is more than sufficient to assuage any concerns regarding the adequacy of the regulatory treatment of video dialtone service. In fact, USTA filed comments on the Petitions for Reconsideration which analyzed the Second Report and Order and found that the fixed regulatory structure adopted by the Commission and outlined above was already premature and would operate to prevent competition and limit public benefits, particularly for the provision of video dialtone by smaller telephone companies.²¹ USTA urged the Commission to focus on narrowing the issues that will come up in the tariff review process, rejecting procedural bottlenecks and delays and dovetailing smaller video dialtone projects into existing section 214 structures, including its exceptions.²²

The Petitioners now attempt to argue that a rulemaking and a joint board are necessary to ensure fair competition. However, as USTA pointed out in its previous comments, petitioners have not correctly described today's environment, nor do they understand the near-complete absence of any current ability on

²¹Comments of USTA filed November 12, 1992.

²²Id. at p. 16. See also, Petitions for Reconsideration filed by Pacific Bell at pp. 15-16 and Bell Atlantic at p. 9.

the part of a significant percentage of exchange carriers to have any impact at all on competing businesses in the cable television area with any anticompetitive acts.²³ The record includes data that, separate from regulatory controls, half of all exchange carriers lack the present ability to leverage any poles and conduit, either because they own none or because they have so few that they cannot have any competitive impact. The record also contains comments of small telephone companies that detail the complete or near-complete absence of any outside plant that can be used in an anticompetitive fashion. It also exhaustively describes the independent access to homes enjoyed by independent cable operators today. Finally, the record does not contain any description of behavior that would demand the actions requested in the Petition.

Therefore, based on the foregoing, USTA urges the Commission to deny the Petition.

Respectfully submitted,

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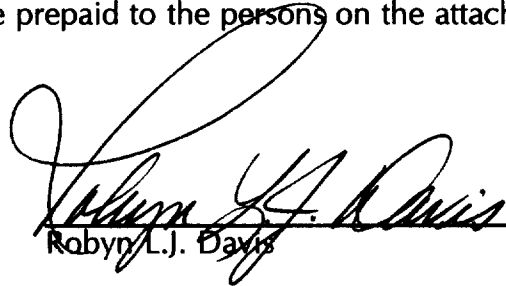
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²³USTA comments at pp. 8-9.

CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on May 21, 1993 copies of the foregoing Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.


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